LEE SUN WAH

v.

LOH KAI SING

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[CIVIL SUIT NO. 311 OF 1982]
27 MAY 1986

CIVIL PROCEDURE: *Judgment in default of appearance - Setting aside - Merits on the defence.*

The plaintiff was claiming from the defendant the balance of RM60,000 out of a loan of RM100,000 given to the defendant. The defendant had given the plaintiff two cheques to settle this balance of RM60,000 but both the cheques bounced. Judgment in default of appearance was entered by the plaintiff against the defendant on 10 December 1982. The defendant then filed a summons-in-chambers dated 24 January 1986 to set aside the judgment in default.

Held:

[1] It is clear law that the defendant must show merits on the defence if he were to succeed in setting aside the judgment in default. In the instant case, the defendant's application was without any merit at all.

[2] In fact, the defendant had not rebutted or explained the two bounced cheques, which formed the basis of the plaintiff's claim.

[Appeal dismissed with costs.]

For the plaintiff - Dhillon; M/s. Dhillon & Co.
For the defendant - Sivam Kandiah; M/s. Sivam & Co.

[**Editor's Note**: The defendant has appealed to the Supreme Court *vide* Supreme Court Civil Appeal No. 174/86.]

JUDGMENT

Mustapha Hussain J:

In this case judgment in default of appearance was entered by the plaintiff against the defendant herein on 10 December 1982. The defendant filed a summons-in-chambers dated 24 January 1986 to set aside the judgment in default which I dismissed. The defendant has now appealed to the Supreme Court against this decision.

The plaintiff filed a writ and statement of claim way back on 11 October 1982 which was served on the defendant on 22 October 1982.

A certificate of non-appearance was filed on 10 December 1982 and the plaintiff also obtained the judgment in default of appearance on the same date.

In brief the plaintiff claimed from the defendant the balance of RM60,000 out of a loan of RM100,000 given to the defendant. The defendant has given two cheques to settle this balance loan of RM60,000 but both these cheques bounced. After obtaining the judgment in default the plaintiff instituted bankruptcy proceedings against the defendant in Bankruptcy No. 339 of 1985. On receipt of the bankruptcy notice the defendant on 24 January 1986 filed

this summons-in-chambers to set aside the judgment in default, supported by an affidavit in which he alleged among other things, that the plaintiff was an unlicensed money-lender, and that he had been paying interests and making other payments towards the loan which he had paid-up in full. He also alleged that the process server served the writ on him on 22 October 1982 which was a Friday (incidentally Friday is a working day in Negeri Sembilan) and denied he was ever served with the writ.

Defendant also alleged that one Francis Wong who identified the defendant to the process server (see affidavit of service, Encl. 2) was not known to defendant. The plaintiff in an affidavit in reply sworn by one Wong Joon Kwai, affirmed that he had known the defendant for about ten years and while working for a solicitor's firm had typed an agreement between the defendant and the plaintiff.

Again, the plaintiff by an affidavit in reply (Encl. 11) affirmed that an AR registered notice of demand dated 8 July 1982 was sent to the defendant and the receipt of which was acknowledged by the defendant. The defendant had claimed that the first time he knew about the plaintiff's claim was when he received the bankruptcy notice in December 1985.

It is clear law that the defendant must show merits on the defence if he were to succeed in setting aside the judgment in default. Instead of showing merits on the defence, the defendant had put up petty issues like he was not served with the writ, the first time he came to know of the plaintiff's claim was in December 1985 when he was served with the bankruptcy notice and so on (when he was in fact served with an AR registered letter of demand dated 8 July 1982).

What was glaring in this case was that the defendant had not rebutted or explained the two bounced cheques No. UMBC 590906 dated 15 December 1981 for RM30,000 and No. UMBC 590907 dated 31 December 1981 also for RM30,000, the basis of the plaintiff's claims.

The Court found the defendant's application to set aside the judgment in default was without any merit at all, and therefore dismissed the application with costs.

Also found at [1986] 2 CLJ 29